

DECISION

J. Richardson
PLM 2
**THE COMPTROLLER GENERAL
OF THE UNITED STATES**
WASHINGTON, D. C. 20548

7548

FILE: B-189897

DATE: September 5, 1978

MATTER OF: Edward J. Ogletree - Waiver of pay and retroactive substitution of leave-without-pay status to obtain earlier disability retirement date

DIGEST: Air Force civilian employee (now deceased) retired for disability on June 15, 1976. He agreed to waive and refund compensation for a few days in 1975 so that he would be eligible to have his retirement date set back retroactively to September 19, 1974, for annuity purposes. Refund may not be accepted by Air Force since there is no authority for employee to waive and refund compensation when salary for his position is fixed by or pursuant to legislative authority. See 54 Comp. Gen. 393 (1974) and court cases cited.

This action is in response to the request for an advance decision submitted by Lieutenant Colonel T. Schneiders, USAF, Accounting and Finance Office, Wright-Patterson Air Force Base, Ohio. Colonel Schneiders requests our decision whether it is proper to collect from an Air Force civilian employee, Edward J. Ogletree (now deceased) the compensation paid him for a few days in 1975. In this connection Mr. Ogletree agreed to refund the payments received so that he could revert to a leave-without-pay (LWOP) status thereby enabling his disability retirement annuity to commence at an earlier date.

A letter from the Commander, 2750th Air Base Wing, Wright-Patterson Air Force Base, attached to Colonel Schneiders' submission states the following:

"1. Mr. Ogletree was a Supervisory Equal Opportunity Specialist, GS-160-12, 2750th Air Base Wing, Wright-Patterson Air Force Base. He retired on disability effective 15 June 1976.

"2. Mr. Ogletree was in a leave without pay (LWOP) status due to illness from 19 September 1974 through 5 October 1975. However, there was an erroneous payment for 16 hours of annual leave for the pay period ending 8 February 1975. From 6 through 28 October 1975, Mr. Ogletree was permitted to report

for duty a few hours each day. During this period, he was in a pay status for 76 hours. Except for a medical examination by the USAF Medical Center on 26 November 1975, he was unable to report for duty after 28 October 1975. He was in a pay status for three hours on 26 November 1975 while undergoing a medical examination and was also paid for eight hours on 27 November 1975, the Thanksgiving holiday. Individual leave and pay records for 1974, 1975, and 1976 are included as attachments 3, 4, and 5, respectively. Since no compensation was paid in 1976, attachment 5 contains only an individual leave record.

"3. Mr. Ogletree underwent a kidney transplant operation in April 1975. The seriousness of his medical condition was recognized. However, this activity concurred in his private physician's release to return to duty on 6 October 1975. It was felt that working a few hours each day would be therapeutical. While he reported for duty from 6 through 28 October 1975, he was actually unable to function and carry out the duties and responsibilities of his position.

"4. The attached 25 March 1976 2750/CC letter (attachment 1) provided the above information to the Civil Service Commission along with Mr. Ogletree's voluntary application for disability retirement. The Commission was requested to permit him to refund all compensation received during the periods specified in paragraph 2 above, thereby reverting to an LWOP status with a retirement annuity effective 19 September 1974. The Commission's 25 August 1976 reply indicated a lack of authority to grant the request and suggested that the General Accounting Office has final administrative authority in such matters (see attachment 2).

"5. The unusual nature of this request is recognized. Mr. Ogletree provided 25 years of service to the federal government. Every effort

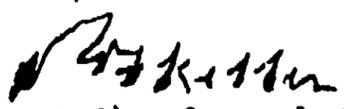
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should be made to authorize a refund of compensation, thus permitting his retirement annuity to be effective 19 September 1974. Including the erroneous payment for 16 hours of annual leave, his total time in a pay status from 19 September 1974 until his retirement on 15 June 1976 was 103 hours. His gross pay was \$1,111.29."

In submitting this matter here, with an attached collection voucher for \$1,111.29, Colonel Schneiders expresses his doubt as to approval of the refund of the compensation paid to Mr. Ogletree in view of the prohibition under 31 U.S.C. 665 against voluntary services being accepted by the Government. However, we do not believe it is necessary to rule on the applicability of 31 U.S.C. 665 since we view this case as one involving the acceptability of a waiver of pay by Mr. Ogletree so that he would be eligible to have his disability retirement annuity begin at an earlier date.

Concerning the waiver and refund of compensation received, our Office has consistently held on the basis of court decisions that it is contrary to public policy for an appointee to a position in the Federal Government to waive his ordinary right to compensation or to accept something less when the salary for his position is fixed by or pursuant to legislative authority. 54 Comp. Gen. 393 (1974); 27 id. 194 (1947); 26 id. 956 (1947); United States v. Jones, 100 F.2d 65 (8th Cir. 1938); Cochran v. United States, 248 U.S. 405, 407 (1919); Clavey v. United States, 182 U.S. 595 (1900); Miller v. United States, 103 F. 413 (S.D.N.Y. 1900). Cf. B-190466, April 19, 1978, 57 Comp. Gen. 423.

In view of the foregoing, we conclude that there is no authority to accept a voluntary waiver and refund of compensation received by Mr. Ogletree for the purpose of making him eligible for a retroactive granting of an earlier retirement date of September 19, 1974. The voucher submitted for acceptance of refund will be retained here.


Deputy Comptroller General
of the United States